DEVELOPMENT & COMMERCIAL BANK BERHAD

v.

ASPATRA CORPORATION SDN. BHD. & ANOR.

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. ANUAR BIN DATO' HJ. ZAINAL ABIDIN CJ (MALAYA)
DATO' PEH SWEE CHIN FCJ
DATO' WAN ADNAN ISMAIL FCJ
[CIVIL APPEAL NO. 02-497-1992]
21 APRIL 1995

PRACTICE & PROCEDURE: *Service - Order for substituted service - Validity - Mode of challenging the validity - Whether proceedings instituted must be for the very purpose - Whether could be challenged collaterally via other proceedings.*

PRACTICE & PROCEDURE: *Judgment - Interest - Interest given in excess of statutory 8% per anum rate - Sum awarded in excess of what was due - Whether judgment irregular - Whether to be set aside ex debito justitiae - Rules of the High Court 1980 O. 42 r. 2.*

PRACTICE & PROCEDURE: *Service - Order for substituted service irregularly granted - Waiver - Defendant applied for leave to enter appearance and defence despite irregular service - Whether application amounted to a waiver.*

These two appeals arose out of two orders made in Chambers in respect of the same civil suit. The facts were that the appellant had lent out monies to the first respondent. On 8 July 1986 the appellant obtained a judgment in default of appearance against the second respondent (Lorraine), who was sued as guarantor of the loan. Lorraine's application to set aside the judgment was allowed by the Registrar, and on appeal, the order was upheld by learned Judge on the grounds, firstly, that the default judgment was bad in law as the substituted service of the writ on Lorraine was bad in law as at the time the writ was issued the appellant should have known that Lorraine was in Britain, and secondly, that the default judgment was for a sum more than what was actually due. This order of the learned Judge formed the subject matter of the first appeal herein. The facts further showed that pursuant to the default judgment Lorraine had entered a conditional appearance for the purpose of setting aside the writ of summons, and thereafter applied to set aside the service on the ground that it was a bad service. The Registrar granted the application, and on appeal, the appeal was dismissed by the Judge. According to the learned Judge the order for substituted service was bad in law, and it follows that service thereof must also be bad. Against this order the appellant has also appealed.

Held:

Per Peh Swee Chin FCJ (delivering the judgment of the Court):

[1] The order of substituted service of the High Court must be obeyed and it can only be challenged as regards its validity by having it set aside by proceedings instituted for the very purpose. It cannot be challenged collaterally in any other proceedings.

[2] In so far as the first appeal is concerned, what came up for decision by both the learned Registrar and the learned Judge was for the setting aside of the default judgment and not for the order of substituted service or service in pursuance thereof to be set aside.

It is thus not for the learned Judge to decide on the validity of the order, and by brushing aside the order of substituted service the way he did, the learned Judge made the error of adjudicating on the validity of the order in proceedings which were not filed for the purpose of setting aside the order or service in pursuance thereof. In this respect it is immaterial that the order was actually made by the Registrar and not a High Court Judge as the Registrar should be considered notionally to be making the order as if he were a deputy High Court Judge.

[3] The default judgment *ex facie*, however, showed such a larger sum in regard to the interest of 18% per anum from the date of judgment to date of satisfaction when the then applicable O. 42 r. 12 of the Rules of the High Court 1980 only allowed for the maximum rate of 8% per anum on a judgment. For this reason alone, the default judgment ought to be set aside *ex debitio justitiae.*

[4] It is an established principle that if a writ cannot be served personally at the time when the writ is issued, there cannot be subsequently any substituted service of the same writ. However if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be useful only if the service had been good, that irregularity is waived. In this case, the irregularity must have been waived by Lorraine when he applied for leave to file an appearance and statement of defence, as such application indicated that the matter of irregular service was a matter of the past and no longer an issue.

[First appeal dismissed. Second appeal allowed]

*[**Bahasa Malaysia** Translation of Headnotes]*

AMALAN & PROSEDUR: *Penyampaian - Perintah untuk penyampaian ganti - Cara mencabar keesahan - Samada prosiding-prosiding yang dimulakan haruslah semata-mata bagi tujuan itu - Samada boleh dicabar secara kolateralnya melalui prosiding-prosiding yang lain.*

AMALAN & PROSEDUR: *Penghakiman - Faedah - Faedah yang diberikan melebihi kadar berkanun sebanyak 8% setahun - Jumlah yang diberikan melebihi apa yang kena dibayar - Samada penghakiman di luar aturan - Samada harus diketepikan ex debito justitiae - Kaedah-kaedah Mahkamah Tinggi 1980 A. 42 k. 2.*

AMALAN & PROSEDUR: *Penyampaian - Perintah bagi penyampaian ganti diberikan secara luar aturan - Penepian - Defendan memohon kebenaran untuk memasukkan kehadiran dan pembelaan walaupun penyampaian luar aturan - Samada permohonan membawa kepada satu penepian.*

Kedua-dua rayuan ini berbangkit daripada dua perintah yang dibuat dalam Kamar berhubung dengan guaman sivil yang sama. Fakta-faktanya adalah bahawa perayu telah meminjamkan wang keluar kepada responden pertama. Pada 8 Julai 1986 perayu telah mendapatkan penghakiman ingkar kehadiran terhadap responden kedua (Lorraine), yang didakwa sebagai penggerenti pinjaman tersebut. Permohonan Lorraine untuk mengenepikan penghakiman tersebut telah dibenarkan oleh Pendaftar, dan di atas rayuan, perintah tersebut telah dipertahankan oleh Tuan Hakim yang bijaksana atas alasan-alasan, pertamanya bahawa penghakiman ingkar tersebut adalah salah di sisi undang-undang kerana penyampaian ganti

writ ke atas Lorraine adalah salah di sisi undang-undang kerana ketika writ tersebut dikeluarkan perayu seharusnya telah mengetahui bahawa Lorraine berada di Britain, dan keduanya, bahawa penghakiman ingkar tersebut adalah bagi jumlah yang lebih daripada apa yang kena dibayar.

Perintah Hakim yang bijaksana ini membentuk hal-perkara rayuan pertama di sini. Fakta-fakta selanjutnya menunjukkan bahawa berikutan dengan penghakiman ingkar tersebut Lorraine telah memasukkan kehadiran bersyarat bagi tujuan mengenepikan writ saman tersebut, dan selepas itu memohon untuk mengenepikan penyampaian tersebut atas alasan bahawa ianya merupakan suatu penyampaian yang tidak teratur. Pendaftar telah meluluskan permohonan itu, dan di atas rayuan, rayuan tersebut ditolak oleh Hakim. Menurut Tuan Hakim yang bijaksana, perintah bagi penyampaian ganti adalah salah di sisi undang-undang, dan disusuli bahawa penyampaiannya haruslah juga salah. Bertentangan dengan perintah ini perayu tersebut telah juga merayu.

Diputuskan:

Oleh Peh Swee Chin HMP (menyampaikan penghakiman Mahkamah):

[1] Perintah penyampaian ganti Mahkamah Tinggi haruslah dipatuhi dan ianya hanya boleh dicabar berhubung dengan keesahannya dengan mengenepikannya melalui prosiding-prosiding yang dimulakan bagi tujuan itu semata-mata. Ianya tidak boleh dicabar secara kolateral dalam mana-mana prosiding yang lain.

[2] Sejauhmana rayuan pertama berkaitan, apa yang berbangkit untuk keputusan oleh kedua-dua, Pendaftar yang bijaksana serta Hakim yang bijaksana adalah bagi pengenepian penghakiman ingkar tersebut dan bukannya untuk perintah bagi penyampaian ganti atau penyampaian selarasnya untuk diketepikan. Ianya dengan itu bukan bagi Hakim yang bijaksana memutuskan mengenai keesahan perintah tersebut, dan dengan mengenepikan perintah untuk penyampaian ganti itu sebagaimana yang telah beliau lakukan, Hakim yang bijaksana telah melakukan kesilapan menghakimi keesahan perintah tersebut dalam prosiding yang tidak difailkan bagi tujuan mengenepikan perintah atau penyampaian berkenaan. Berhubung dengan perkara ini, ianya adalah tidak penting bahawa perintah tersebut telah sebenarnya dibuat oleh Pendaftar dan bukannya Hakim Mahkamah Tinggi kerana Pendaftar seharusnya dianggap membuat perintah tersebut seolah-olah beliau merupakan timbalan Hakim Mahkamah Tinggi.

[3] Penghakiman ingkar berkenaan *ex facie*, walaubagaimanapun, menunjukkan jumlah yang lebih besar sehubungan dengan faedah sebanyak 18% setahun daripada tarikh penghakiman sehingga kepada tarikh penjelasan sedangkan A. 42 k. 12 Kaedah-kaedah Mahkamah Tinggi 1980 yang ketika itu terpakai hanya membenarkan kadar maksima sebanyak 8% setahun ke atas sesuatu penghakiman. Atas alasan ini sahaja, penghakiman ingkar tersebut seharusnya diketepikan *ex debito justitiae*.

[4] Ianya merupakan prinsip yang tetap bahawa jika sesuatu writ tidak boleh disampaikan secara ke diri pada waktu writ tersebut dikeluarkan, tidak seharusnya terdapat berikutan itu apa-apa penyampaian ganti writ yang sama. Walaubagaimanapun, jika seseorang mengetahui mengenai keadaan luar aturan sesuatu penyampaian dan kemudiannya mengambil langkah yang seterusnya dalam tindakan tersebut yang mana hanya berguna jika penyampaian tersebut dilakukan dengan betul, luar-aturan tersebut adalah diketepikan. Dalam kes ini, keadaan luar-aturan tentunya telah diketepikan oleh Lorraine bilamana beliau memohon untuk mendapatkan kebenaran bagi memfailkan satu kehadiran dan

pernyataan pembelaan, oleh kerana permohonan yang sedemikian menunjukkan bahawa perkara luar aturan penyampaian adalah suatu perkara yang telah berlalu dan tidak lagi merupakan satu isu.

[Rayuan pertama ditolak. Rayuan kedua dibenarkan].

Cases referred to:
Pembinaan KSY v. Lian Seng Properties Sdn. Bhd. [1991] 1 MLJ 100 ***(refd)***
Phuah Bee Hong v. Pentadbiran Tanah Daerah [1994] 1 AMR 1427 ***(refd)***
Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***
Fry v. Moore [1889] 23 QBD 395 ***(foll)***
Field v. Bennett 56 LJ QB 89 ***(foll)***
Rein v. Stein [1892] 60 LT 469 ***(foll)***
Boyle v. Sacker [1889] 39 Ch. D 249, CA ***(foll)***

Legislation referred to:
Rules of the High Court 1980 O. 42 r. 12

For the appellants - Rajendra Navaratnam; M/s. Azman Davidson & Co.
For the respondent - Renu Zechariah; M/s. Anad & Assoc.

JUDGMENT

Peh Swee Chin FCJ:

The 2 appeals above-mentioned arose out of 2 orders originally made in chambers in the same civil suit i.e. the civil suit above-mentioned. We have earlier dismissed the appeal in Civil Appeal No. 02-497-92 and at the same time, we have allowed the appeal in Civil Appeal No. 02-316-93 with costs in both appeals. We indicated we would give grounds of decision and we hereby do so.

First we deal with Civil Appeal No. 02-497-92.

In this appeal, the learned Judge below upheld the order of the setting aside of a judgment in default of appearance dated 8 July 1986 obtained earlier by the plaintiff against the 2nd defendant who was sued as guarantor in respect of money lent by the plaintiff to the 1st defendant. The 2nd defendant had first applied to set aside the default judgment before the learned Registrar and the learned Registrar had allowed it to be set aside, and on appeal, the learned Judge upheld the learned Registrar's order as stated above.

In the grounds of judgment of the learned Judge, two main reasons were given for upholding the setting aside of the default judgment. The first reason was that the service on the 2nd defendant by way of order for substituted service was bad in law "because the order of substituted service was bad in law", and since the service effected in this manner was bad in law, the default judgment was also bad in law. It will be remembered that on this occasion what came up for decision by both the learned Registrar and the learned Judge was for the setting aside of the default judgment, *inter alia*, but not for the order of substituted service or service in pursuance thereof to be set aside. That this is important to bear in mind will become apparent later.

The second reason was that, the default judgment was for a sum more than what was actually due, it was therefore also bad in any event.

It would be necessary to recapitulate some brief facts. On 17 October 1985, the writ of summons with a statement of claim herein was filed. On 27 November 1985, an *ex-parte* summons in chambers was filed, asking for order that the writ of summons etc. be served by substituted service etc. on the 2nd defendant by posting a copy of each relevant document on the notice board of the High Court and on a conspicuous part of the last known premises of 2nd defendant at No. 261 Jalan Kia Peng, Kuala Lumpur and also by inserting in one issue of a local newspaper etc. The supporting affidavit stated that 2 attempts were made to serve the writ of summons etc, on 28 October 1985 and 29 October 1985 and both occasions, "the 2nd defendant was not in", Then on 1 November 1985 the plaintiff's solicitors sent the usual letter of appointment by A. R. Registered Post, that the process server would call on 6 November 1985 at about 5.30 pm for serving the writ of summons etc. Again, the process server was unsuccessful, hence the process server believed that the 2nd defendant was trying to avoid service. The order of substituted service was then made in terms on 15 January 1986 when the application came up before the learned Registrar on that day in the presence of Counsel for the plaintiff, Mr Tan Leh Kiah.

The judgment dated 7 August 1986 in default of appearance was then entered as set out below:

Judgment in Default of Appearance

> No appearance having been entered by the second defendant herein, IT IS THIS DAY ADJUDGED that the second defendant do pay the plaintiff the sum of $28,905,648.95 together with interest thereon at the rate of 18% per annum from 27 August 1985 until the date of realisation AND IT IS LASTLY ADJUDGED that the second defendant do pay the plaintiff legal charges and costs on a solicitor and client basis.
>
> Dated this 8 July 1986.
>
> Signed
> ...
> Senior Assistant Registrar
> High Court
> Kuala Lumpur

On 8 November 1990, the 2nd defendant applied by summons to set aside the said default judgment dated 7 August 1986, and at the same time, by prayer (2), for an order " that 2nd defendant be given leave to file an appearance and statement of defence to the plaintiff's claim herein."

In his affidavit in support, the 2nd defendant by then incarcerated at Brixton Prison, London, deposed to the affidavits filed by the plaintiff in support of the earlier application for substituted service to the effect that the deponent was trying to avoid the service of the writ of the statement of claim when 3 attempts were made to serve the writ on him without success. The 2nd defendant deposed that on 8 November 1984 he and his family had left Malaysia and that it was untrue he was trying to avoid the service. The 2nd defendant exhibited newspaper cuttings from the New Sunday Times and Sunday Star both for the issue of 8 December 1985, wherein his arrest by the British police was reported quite prominently.

In the same affidavit, the 2nd defendant deposed to the said default judgment and said it was erroneous; (a) for allowing interest at 18% p.a from the date of judgment to the date of realization when the prayer to the statement of claim itself claimed only 8% p.a from date of judgment to date of realization and (b) for allowing the plaintiff to be paid legal charges and costs on a solicitor and client basis.

The first reason of the learned Judge about the default judgment being bad because the order of substituted service was bad, was grounded on the undisputed fact that on 8 November 1984 the 2nd defendant and his family had left Malaysia and had never returned to Malaysia since and that on 8 November 1984, the present civil suit in the High Court was not yet even filed. The order for substituted service was bad in law because the plaintiff "must be aware that the 2nd defendant was already outside the jurisdiction of the Courts and that the only way the service can be effected was to obtain leave of Court ..."

For our part, with great respect we were unable to agree with the learned Judge for deciding in this manner by brushing aside the order of substituted service, for the learned Judge was obviously considering the validity of the order of substituted service of the High Court dated 5 January 1986 when the same order was not a subject matter of an application before the learned Judge or for that matter, before the learned Registrar earlier for its discharge. The order of substituted service of the High Court, a superior Court of competent jurisdiction, must be obeyed by every one save in a few and rare exceptions and it can only be challenged as regards its validity by the only way of having it set aside by proceedings instituted for the very purpose. It cannot be challenged thus collaterally in any proceedings as regards its validity save in a very few rare exceptions, (such as a Bankruptcy Court going behind a judgment of any Court on credibly raised issues of collusion, fraud, etc. only on hearing a bankruptcy petition), which all do not apply here, Please see *Pembinaan KSY v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100, Supreme Court; *Phuah Bee Hong v. Pentadbiran Tanah Daerah* [1994] 1 AMR 1427, Supreme Court; *Hadkinson v. Hadkinson* [1952] 2 All ER 567. In this connection, it is immaterial that the said order of the High Court was actually made by the learned Registrar and not a High Court Judge. The learned Registrar should be considered notionally to be making the order as if he were a deputy High Court Judge.

With great respect, the learned Judge was making a similar error as the learned Judge in *Pembinaan KSY, supra*, by adjudicating on the validity of the order of substituted service not in actual proceedings filed for the very purpose of having the order for substituted service or service in pursuance thereof set aside.

About the second reason of the learned Judge in holding that the default judgment dated 8 July 1986 was in respect of a sum larger than was actually due, we were in entire agreement with it. The default judgment *ex facie* showed such a larger sum in regard to the interest of 18% p.a, from date of judgment to date of satisfaction when the then applicable O. 42 r. 12 of the Rules of the High Court 1980, (before its amendment on 12 December 1986), only allowed for the maximum rate of only 8% p.a. on a judgment. For this reason alone, the default judgment ought to be set aside *ex debito justitiae* without the need to consider any further reason leading to the conclusion that the default judgment ought to be set aside. The learned Judge could of course consider the validity of the default judgment itself as it was coming up in a proceeding instituted for the very purpose of having it set aside.

We therefore dismissed the appeal with costs in Civil Appeal No. 497-92.

We now give our reasons for allowing the appeal in Civil Appeal No. 02-316-1993.

This arose out of proceeding to challenge directly and not collaterally, the validity of the service pursuant to the order of substituted service, by asking for the service of writ etc, on the 2nd defendant to be set aside; and by the inevitable and necessary implication, for such order of substituted service to be itself set aside.

The 2nd defendant had on 25 May 1992 entered a conditional appearance for the purpose of setting aside the writ of summons etc.

On 29 May 1992, after such conditional appearance, the 2nd defendant filed an application to set aside such service on the ground it was wrong in law. The learned Registrar heard the application, granted it in terms as prayed. On appeal to the Judge in chambers, the appeal was dismissed. The ground of the learned Judge was that such an order of substituted service was bad in law and the consequent service in pursuance thereof was also bad in law.

The learned Judge took it apparently for granted that the writ of summons itself was not bad, and we would agree with it, for even though the 2nd defendant was out of jurisdiction at the time of the issue of the writ, "... the plaintiff might have kept it with the view of serving it on the defendant if he should come within the jurisdiction", per Lindley LJ in *Fry v. Moore* [1889] 23 QBD 395. In this connection, it is interesting to observe that by entering a conditional appearance, in any event, the 2nd defendant would then have been deemed to have submitted to the jurisdiction of the Court - subject to the right to apply to set aside the writ or service of the writ.

We agreed however with the learned Judge that the service and also order of substituted service were bad in law; they were irregular for the following reason, There is an established old principle that if a writ cannot be served personally at the time when the writ is issued, there cannot be subsequently any substituted service of the same writ, see *Fry v. Moore supra*, *Field v. Bennett* 56 LJ QB 89. But this was not the end of the matter, the question of waiver was raised and argued by the plaintiff.

It was pressed in argument that prior to this application to set aside service in question on 29 May 1992, in fact about 1/2 years earlier, the 2nd defendant had applied by summons dated 8 November 1990 before the learned Registrar, for 2 prayers, the first being the setting aside of the said default judgment, as dealt with earlier, and the 2nd prayer being: "that the 2nd defendant be given leave to file an appearance and statement of defence to the plaintiff's claim herein", The order thereon was not extracted or put in the appeal record, but on appeal to the learned Judge only the issue of setting aside the default judgment was taken. We suppose nobody felt it necessary or relevant then for the order on the 2nd prayer to be taken or argued.

But now it was raised in connection with the present application to set aside the writ and service, that prayer (2) had amounted to a waiver of any irregularity of service on the 2nd defendant, *Fry & Moore, supra*, was cited as the authority. In *Fry & Moore,* the facts were, on material points, similar. When the writ there was issued, the defendant was out of jurisdiction. A motion (without entering a conditional appearance, be it noted) was taken out for service to be set aside; the Court of Appeal there, subsequently held that the defendant there had taken such further steps in the action "which would only be proper steps on the theory that the order of substituted service was a proper order". The steps referred to and taken by the defendant were in applying for an order for the plaintiff to deliver a statement of claim (the writ was presumably not endorsed with a statement of claim). Lindly, LJ further held to the effect that by such application, the action was treated by the defendant there as a properly constituted action, "the object being to enable the defendant to raise a defence on the merits", and therefore the irregularity of the order of the substituted service had been waived, and the impugned service was upheld.

A person cannot approbate and reprobate, so that if a person becomes aware of an irregularity of service and then subsequently takes a further step in the action which could be only useful if the service had been good, the said irregularity is waived. See also *Rein v. Stein* [1892] 60 LT 469, 471; *Boyle v. Sacker* [1889] 39 Ch. D 249, CA. We are in entire agreement with the decision in *Fry & Moore, supra*. The 2nd defendant had asked for leave to file an appearance and to file a statement of defence, clearly indicating that he wanted to go into the fray in full swing and that the matter of irregular service was a matter of the past; no longer an issue.

Testing the 2nd prayer in the application dated 8 November 1990 in another way; could the said prayer in question be a step merely to assert the objection, (a) that the service was irregular, or (b) that the said default judgment was wrongly entered? A negative answer would be apparent to these questions on reflection. The argument of waiver would still hold good.

We have therefore held that the irregularity of the service was waived; in other words, the service of the 2nd defendant was valid.

For the reasons stated, we allowed the appeal with costs.